## CONCLUSION

For the reasons set forth above, as well as for the reasons explained in the *Petition*, petitioners respectfully request that this Court grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

MARTIN HORN, Commissioner,
Pennsylvania Department of Corrections, et al.,
*Petitioners*,

*vs.*

ANTUAN BRONSHTEIN,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is a state procedural default rule adequate to preclude federal review of a defaulted claim if it gives fair notice of the rule and a reasonable opportunity to comply, or must the rule further be "strictly" applied?

2. Does a newly enacted statutory rule of procedure provide adequate notice of its plain meaning when it is contrary to preexisting case law, or does it become adequate only when a court confirms that it means what it says?

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## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

### INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The severe interpretation of the procedural default rule used in this case will effectively nullify state habeas reforms for a

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.
Both parties have given written consent to the filing of this brief.

period of ... s after they are adopted. Such interference with the States ... ministration of their criminal justice systems is contrary to the interests CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

Fifteen years ago, Antuan Bronshtein shot and killed Alexander Gutman while robbing his jewelry store. See *Bronshtein* v. *Horn*, 404 F. 3d 700, 703 (CA3 2005). A month later, he killed Jerome Slobotkin, another jeweler, in another county, for which he was convicted in separate proceedings. See *id.*, at 703-704.

The jury in the present case convicted Bronshtein of the murder of Mr. Gutman, robbery, theft, conspiracy to commit murder, theft of movable property, and possession of an instrument of crime, and they found true the aggravating circumstances of felony murder and a history of violent felonies. See *id.*, at 704. The Pennsylvania Supreme Court affirmed on direct appeal, *Commonwealth* v. *Bronshtein*, 547 Pa. 460, 691 A. 2d 907 (1997), and this Court denied certiorari on October 20, 1997. See *Bronshtein* v. *Pennsylvania*, 522 U. S. 936. This is the date on which the judgment became "final" for the purpose of starting the clock on Pennsylvania's one-year time limit for collateral review. See *Commonwealth* v. *Bronshtein*, 561 Pa. 611, 615, 752 A. 2d 868, 870 (2000).

The Center for Legal Education Advocacy and Defense Assistance (CLEADA) filed a state postconviction petition, but it was dismissed when Bronshtein voluntarily abandoned it, and the Pennsylvania Supreme Court affirmed. See *id.*, at 613, 752 A. 2d, at 869.

On April 26, 1999, Bronshtein's mother and sister filed a "next friend" federal habeas petition. See 404 F. 3d, at 705. Because Bronshtein had now changed his mind, the District Court issued a stay and gave him 120 days to file his own petition. See *ibid.*

On June 9, 1999, Bronshtein instead filed a state postconviction petition, which the trial court dismissed on both waiver and untimeliness grounds. See 561 Pa., at 614, 752 A. 2d, at 869-870. The Pennsylvania Supreme Court affirmed on the untimeliness ground, because the petition was filed more than a year after finality on direct review, and no exception applied. See *id.*, at 614-617, 752 A. 2d, at 870-871.

On October 27, 1999, Bronshtein filed the present federal habeas petition. See 404 F. 3d, at 706.[2]

The District Court rejected the Commonwealth's procedural default argument and granted relief as to both guilt and penalty. See *ibid.* The District Court found merit in Bronshtein's claims on the co-conspirator liability instruction, informing the jury regarding eligibility for parole, and the felony-murder aggravating circumstance. See *ibid.* All three of these claims were raised for the first time in the second, untimely state postconviction petition. See *id.*, at 707.

The Court of Appeals affirmed the District Court's holding that the claims were not procedurally defaulted. Although conceding that the rule appears plainly on the face of a statute enacted before Bronshtein's default, the Court of Appeals held that the rule was not "firmly established and regularly applied until after Bronshtein missed the PCRA one-year filing deadline." *Id.*, at 708. The reason for this holding was that the Pennsylvania Supreme Court had previously relaxed its own nonstatutory default rule in capital cases, and as of the date of Bronshtein's default had not held that this "relaxed waiver rule" was not applicable to the statutory time limit. See *id.*, at 708-709.

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2. There is no discussion in the opinion as to why this petition is timely under federal law. It would be timely only if the state postconviction review petition filed by CLEADA was "properly filed" for the purpose of 28 U. S. C. § 2244(d)(2), which seems doubtful. See 404 F. 3d, at 705 (no claim for relief, contrary to defendant's instructions).

On the merits, the Third Circuit Court of Appeals held that the co-conspirator liability instruction was harmless error. See *id.*, at 712. The Court of Appeals affirmed the grant of relief on penalty based on the eligibility for parole issue. See *id.*, at 719. The Court of Appeals also rejected Bronshtein's other claims. See Pet. for Cert. 7, n. 2.

## SUMMARY OF ARGUMENT

This Court has used a number of different verbal formulations to describe an "adequate" state ground over the years. Some cases state that an adequate ground need only provide fair notice, while others state that only "strictly" enforced rules are adequate. This uncertainty in the law requires correction, and only this Court can correct it.

A statute provides fair notice of its plain meaning. The fact that the plain meaning is contrary to prior case law is not sufficient to render a new statute inadequate as an independent state ground.

The procedural default rule is necessary to protect the integrity of both the traditional exhaustion requirement and the new deference standard. A cramped interpretation of the default rule, such as the one in the present case, has the perverse result of placing a petitioner who deliberately bypassed his state remedy in a *better* position than one who followed the proper procedure.

## ARGUMENT

### I. This Court's jurisprudence on the adequacy of state procedural default rules is contradictory and requires resolution.

This case involves the recurring question of how much consistency and clarity a state's procedural default rule must have before it can serve as an "adequate" state ground preclud-

ing federal review of a defaulted claim. Ironically, the answer to this question is itself inconsistent, unclear, and inadequate.

*NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958) stated only a modest requirement that the defaulting party have notice of the rule's existence. *James* v. *Kentucky*, 466 U. S. 341, 348 (1984) referred to "firmly established and regularly followed state practice," while *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964) declared inadequate any rule "not strictly or regularly followed . . . ." If the word "strictly" is construed strictly, this becomes a severe limitation that includes very few rules. See *Lee* v. *Kemna*, 534 U. S. 362, 390 (2002) (Kennedy, J., dissenting).

*Ford* v. *Georgia*, 498 U. S. 411, 423-424 (1991) quoted these widely varying standards without resolving them. Under the circumstances of the case, it was not necessary to resolve them, because the state rule failed the lenient notice test. See *id.*, at 424. The issue was briefed in *Lee* v. *Kemna*, *supra*, but the Court decided the case on the related but distinguishable ground that a generally sound rule had been applied in a context where it served no purpose. See 534 U. S., at 376.

There is a wide gulf between a rule that is clear enough to give fair notice and a rule that is "strictly" applied, especially if the word "strictly" is given the severe interpretation it received in this case. A litigant can have notice that a rule exists and that noncompliance *may* result in loss of his claim even if the rule has exceptions that are less than crisply defined, leave some discretion in their application, or evolve over time.

The "strictly followed" requirement not only directly conflicts with the *NAACP* notice standard, but it creates considerable tension with the *Lee* v. *Kemna* "exorbitant application" standard. See 534 U. S., at 376. Suppose, hypothetically, that the Missouri Court of Appeals in *Lee* had waived application of the rule in question, on the ground it served no legitimate state interest in the circumstances of the case. The *Lee* decision certainly implies that is the proper course. Later,

another Missouri defendant fails to comply with the rule in circumstances where it makes good sense to apply the rule, and the state court refuses to waive the default. When that case reaches federal court, the petitioner claims that the state rule is inadequate as not "strictly followed," because the state courts waived it in Lee's case. Under a draconian version of the "strictly followed" requirement, that argument would prevail. The rule is "inadequate" in individual cases if it *is* strictly followed, and it is inadequate in *all* cases if it is not strictly followed.

Although the language of the Court's cases in this area cannot be reconciled, the holdings can, with a single exception. All that is needed is a simple rule that the claimant have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to comply with it. See *NAACP*, 357 U. S., at 457 ("apprised"); *Central Union Tel. Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925) ("reasonable opportunity"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 386-387, 392 (2d ed. 1996); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 5-10, 15-19 ("CJLF *Lee* Brief").[3] The confusion created by the inconsistent language in this Court's opinions has already continued much too long, and only this Court can clarify the standard.

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3. *Lee* v. *Kemna*, 534 U. S., at 380-384, can be considered to be within the category of lack of notice of applicability to the circumstances. The one case that cannot be reconciled in its holding is *Henry* v. *Mississippi*, 379 U. S. 443 (1965), a case heavily criticized by the *Lee* dissent, 534 U. S., at 393-395, and not defended or relied on by the majority. See *id.*, at 386; see also CJLF *Lee* Brief 18.